ORIGINAL

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.



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| In the Matter of | ) | |
| | ) | |
| Amendment of the Commission's Rules | ) | WT Docket No. 97-81 |
| Regarding Multiple Address Systems | ) | |



To: The Commission

## COMMENTS OF
## FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.

**FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.**

Eliot J. Greenwald, Esq.
Fisher Wayland Cooper Leader
& Zaragoza L.L.P.
2001 Pennsylvania Avenue, N.W., #400
Washington, D.C. 20006-1851
(202) 659-3494

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## Summary

The Commission lacks the statutory authority to conduct auctions to assign MAS licenses for which applications were filed prior to July 26, 1993. According to Supreme Court precedent, the Commission can retroactively apply its auction authority only if Congress clearly stated that such application was intended. No such indication is evident in the statute or in the legislative history. In fact, Congress expressly prohibited auctions in some retroactive contexts.

Even if the Commission did have this authority, however, various fairness and public interest considerations would still require lotteries for these MAS licenses. The applications for these licenses were filed a year and a half before the passage of the auction legislation, and the applicants could not have foreseen that such legislation would have been enacted prior to the processing of their applications and the holding of the lotteries, or that such legislation might apply to their applications retroactively. Many applicants expended substantial resources prior to filing their applications on legal and engineering support, in full reliance on the Commission's lottery policy.

In addition, not only are lotteries fairer in this context, they are also more efficient administratively. The Commission has already processed the over 50,000 pending applications, prepared a lottery list, designed the lottery and drafted a public notice announcing the lottery. All the Commission need do is release the public notice and hold the lottery 60 days thereafter. This would be far quicker and more efficient than developing auction rules, issuing public notices and an auction manual, accepting applications and upfront payments, conducting the

auction, dismissing over 50,000 applications and returning the filing fees, and defending in court challenges by the dismissed applicants.

If the Commission wishes to use geographic area licensing as opposed to site specific licensing, it could convert the pending applications into geographic area applications for the geographic areas that contain the master transmitter sites. Each applicant would be limited to one lottery chance in each geographic area. Alternatively, the Commission could license the pending applications on a site specific basis by lottery and later hold an auction for the areas not covered by the cite specific licenses, as was done for 900 MHz SMR and as is planned for paging, 220 MHz SMR and 800 MHz SMR.

Lastly, in the event the Commission does decide to hold an auction and dismiss the 50,000 plus pending applications, then the Commission must refund to the applicants the application filing fees. The applicants would not have received the chance in the lottery they paid for. Therefore, if the Commission were to keep the fees, the Commission would be taking money for a service that it did not provide.

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**FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.**

Fisher Wayland Cooper Leader & Zaragoza L.L.P. ("Fisher Wayland"), on behalf of its clients and pursuant to Section 1.415 of the Commission's rules, hereby submits its Comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Commission in the captioned docket.[1/] Fisher Wayland prepared and filed applications for a number of Multiple Address Service ("MAS") applicants who filed their applications prior to July 26, 1993. These applications are now pending before the Commission. For the reasons explained below, Fisher Wayland strongly urges the Commission to hold lotteries for the pending applications and not subject such applications to dismissal or to competitive bidding.

## Background

In January and February of 1992, the Commission received over 50,000 applications for licenses among the forty available 12.5 kHz channel pairs to provide MAS service in the 932-932.5 MHz and 941-941.5 MHz bands. The Commission had earlier issued *Public Notice,* DA-

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1/ Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Regarding Multiple Address Systems,* WT Docket No. 97-81, released February 27, 1997.

91-1422, 6 FCC Rcd 7242 (released Nov. 27, 1991), stating that it would open five two-day filing windows and thereafter license applicants on a first-come, first-served basis. The *Public Notice* further stated that in the event that mutually exclusive applications were received, lotteries would be used to select among the competing applicants.

Meanwhile, on August 10, 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which, *inter alia,* amended the Communications Act to authorize the FCC to allocate certain radio spectrum through competitive bidding, or auctions.[2/] As a result, in PP Docket No. 93-253, the Competitive Bidding docket, the Commission looked at various radio services to determine whether they should be subject to competitive bidding, and concluded that it would not be appropriate to use competitive bidding for the over 50,000 MAS applications that were pending.[3/] Thereafter, the Commission staff continued its processing of the 50,000 plus MAS applications, prepared a lottery list, drafted a *Public Notice* announcing the lottery, but never released the lottery list or the *Public Notice.*

**Discussion**

## I. The Commission Does Not Have the Statutory Authority to Conduct Auctions to Assign MAS Licenses for Which Applications Were Filed Prior to July 26, 1993

The Commission is legally obligated to conduct a lottery for any MAS license for which applications were filed prior to July 26, 1996. In order to auction such a license, the Commission

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2/ Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993), codified at 47 U.S.C. § 309(j).

3/ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,* PP Docket No. 93-253, *Second Report and Order,* 9 FCC Rcd 2348, 2354 n.25 (1994) ("*Competitive Bidding Second Report and Order*"); *See also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,* PP Docket No. 93-253, *Notice of Proposed Rulemaking,* 8 FCC Rcd 7635, 7659-60 (1993) ("*Competitive Bidding NPRM*"),

would have to apply a legislative rulemaking retroactively.[4/] The Supreme Court has repeatedly found that statutory grants of rulemaking authority do not encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.[5/] The Court most recently addressed this issue in *Landgraf v. USI Film Products.*[6/] In *Landgraf,* the Court held the following:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. . . . When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would . . . impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[7/]

The Budget Act's provision establishing the use of auctions would clearly impose new duties and legal obligations on lottery applicants, and does not include the requisite "express command" or speak with sufficient clarity to justify retroactive use of auctions for applications already on file with the FCC. On the contrary, Congress expressly granted the FCC permission to conduct lotteries -- not auctions -- for applications on file prior to July 26, 1993.[8/]

In fact, the legislative history of the Budget Act directly addressed the issue of retroactivity, and this material clearly supports the assignment of the previously filed MAS applications by lottery. At first, Congress planned to mandate retroactivity of the auction

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4/ Legislative rulemaking occurs when agency rules are promulgated at Congress' behest, as compared to an administrative rulemaking (agency promulgating rules on its own with no statutory mandate) or adjudicative rulemaking (rules that arise out of an adjudication).

5/ *See, e.g., Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988).

6/ 114 S. Ct. 1483 (1994).

7/ 114 S. Ct. at 1505.

8/ Budget Act Special Rule § 6002(e)(2), 107 Stat. at 397.

procedures for all non-exempt (*i.e.*, broadcast or non-profit) applications already on file.[9/] However, the Senate Amendment to this legislation (incorporated by reference into the final Conference Report) expressly stated that auctions should apply only to the granting of new spectrum licenses, and "should not . . . alter existing spectrum allocation procedures."[10/] Ultimately, Congress added § 6002(e)(2) to the final legislation -- an express permission to continue using lotteries for prior filed applications. The incorporation of this provision weighs heavily against the NPRM proposal, in view of the fact that Congress considered, then backed off from, a mandate for retroactive use of the auctions. Furthermore, in discussing the abandonment of lotteries, the Conference Report voiced a concern over specific retroactive applications of the auctions by expressly allowing the FCC to maintain lotteries for all applications filed prior to July 26, 1993, mentioning "the nine Interactive Video Data Service markets for which applications have already been accepted, and several other licenses" as examples of when lotteries are to be maintained.[11/]

Thus, consistent with the interplay of this legislative history, Section 6002(a) of the 1993 Budget Act, and the above-cited Supreme Court precedent, the Commission has chosen to conduct lotteries both for IVDS licenses and cellular licenses for "unserved" areas where applications for those licenses were on file before July 26, 1993.[12/] Similarly, the Commission is required to conduct lotteries for all MAS licenses for which applications were on file prior to the Budget Act's passage.

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9/ *See, e.g.*, H.R. Rep. No. 111, 103d Cong., 1st Sess. 253, 262-63 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 580, 589-90.

10/ 139 Cong. Rec. S7986, S7995 (daily ed. June 24, 1993).

11/ H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1187 (emphasis added).

12/ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 7387 (1994) ("*Unserved Areas Order*").

## II. Fairness Considerations Require Lotteries for the MAS Licenses For Which Applications Were Filed Prior to July 26, 1993

Even if the Commission does not acknowledge its legal obligation, fairness and public interest considerations demand that the Commission conduct lotteries for all MAS licenses for which applications were filed prior to July 26, 1993. First, the applications for the MAS licenses were filed in January and February of 1992, a year and a half before the Budget Act was adopted by Congress. Thus, these applicants could not have foreseen the enactment of the auction legislation prior to the Commission holding lotteries or have anticipated that their licenses might someday be subject to competitive bidding.[13/] It was not until after the 103rd Congress took office in January of 1993 (a year after the applications were filed) that it appeared that enactment of auction legislation may become reality. By that time the applications should have been processed and the lottery held (or at least lottery lists issued) under normal lottery processing time. In fact, this "notice" factor weighs in favor of a lottery more heavily in this context than in the unserved areas proceeding, where the parties who filed unserved area lottery applications

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13/ The importance of proper notice is illustrated by the Commission's 1983 decision to use lotteries instead of comparative hearings to assign LPTV licenses in mutually exclusive situations even where applications had been on file prior to the Commission's adoption of its lottery rules. In support of its decision, the Commission stated the following:

> We proposed in the LPTV NPRM that if a winning applicant could not be selected on the basis of proposed comparative preferences, the cases would be referred to lottery. Thus, all post-NPRM filers were on notice that lotteries were a real possibility.

(emphasis added). *Second Report and Order Concerning Lottery Implementation,* 53 RR 2d 1401, 1409 (1983 ). The Commission's decision to switch from comparative hearings to lotteries in the cellular service was upheld by the U.S. Court of Appeals for the D.C. Circuit in *Maxcell Telecom Plus, Inc. v. FCC,* 62 RR 2d 1501 (D.C. Cir. 1984). The court specifically found that the applicants who complained of the Commission's decision were all on notice of the possibility of this change prior to filing their applications. *Maxcell,* 66 RR 2d at 1505.

were at least told that the Commission would "revisit" the decision to use lotteries if it received Congressional authority to conduct auctions.[14/]

In addition, many applicants expended substantial resources prior to filing their applications in reliance on the Commission's lottery policy. Many of these parties carefully designed their business plans to account for the administrative and start-up costs associated with the lottery process, while few if any were likely to have incorporated the initial costs associated with auctions. In addition to their FCC filing fees, these applicants also expended considerable sums for pre-lottery legal and engineering support. If the Commission chose to auction these licenses, even if the FCC filing fees were refunded, these other reasonable expenditures would be rendered worthless.[15/]

Also, if implemented, auctions would impose new and unexpected liabilities on the original lottery applicants. An auction would require applicants to switch from the less substantial lottery business plan (*i.e.,* money to construct and operate) to a more substantial business plan (*i.e.,* money to construct, operate, and acquire the spectrum). In many cases, small businesses which had plans to develop niche markets would be unable to do so if the business plans called for purchasing the spectrum as well. The financial inability of applicants to bid in an

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14/ *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service, First Report and Order and Memorandum Opinion and Order on Reconsideration,* 6 FCC Rcd 6185, 6217 (1991).

15/ *See Bowen,* 488 U.S. at 220 (Scalia, J., concurring) (altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule is an example of unreasonable retroactivity); *see also* National Ass'n of Indep. Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (2d Cir. 1974) (new Prime Time Access Rule unreasonable because it would cause serious economic harm to independents who produced access programming in reliance on old rule).

auction after those same applicants previously qualified in a lottery for the same spectrum represents an unfair and unreasonable retroactive change in policy.[16/]

Finally, were the Commission to implement auctions and reopen the application process for this same MAS spectrum, the shift would confer an unfair benefit upon any new applicants. The Commission's original *Public Notice* concerning filings for these MAS licenses put all prospective applicants on notice that if they did not file during the filing windows, they would be excluded from these assignment proceedings. Accordingly, entities who did not file during the filing windows were unable to participate in the anticipated MAS lotteries. Those parties who were timely filers and diligently complied with the Commission's requirements have an equitable interest in the enforcement of these rules,[17/] and the Commission cannot change its rules to the detriment of those who filed applications in conformance with the rules over five years ago.

Three years ago, in discussing a similar scenario, the U.S. Court of Appeals for the D.C. Circuit shed light on the difficulties that face original applicants when the Commission reopens its application process many years into a pending proceeding:

> An observer uninitiated in the cellular licensing process might respond, "Big deal. They can just refile." It is not that easy. Neither time nor the FCC nor petitioners' competitors have stood still in the roughly four years since petitioners filed the disputed applications. In the interim, the rules of the game have changed, generally not to the petitioners' benefit. As lotteries have replaced comparative hearings, more applicants have entered the field in competition with petitioners.[18/]

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16/ *See Association of Accredited Cosmetology Schools v. Alexander,* 979 F.2d 859, 865 (D.C. Cir. 1992) (citing *Bowen; National Wildlife Fed'n v. March,* 747 F.2d 616 (11th Cir. 1984) (undoing past eligibility as unreasonable retroactivity)).

17/ *See, e.g., McElroy Electronics Corp. v. FCC,* 3 CR 484, 490-91 (D.C. Cir. 1996) ("McElroy II").

18/ *McElroy Electronics Corp. v. FCC,* 990 F.2d 1351, 1358 (D.C. Cir. 1993) ("McElroy I").

The five year delay has already resulted in lost market opportunities, not to mention that the investment already expended by the original applicants has been tied up all this time. To retroactively change the rules from lottery to auction, dismiss the original applications, and provide an application opportunity to newcomers, would be the sort of gross injustice that the Court of Appeals found so repulsive in *McElroy I* and *McElroy II.*

## III. Factors Cited by the Commission in Favor of Auctions Do Not Withstand Analysis

### A. Holding Lotteries in This Case is Administratively Simpler Than Holding Auctions

In its NPRM, the Commission first argues that the large number of pending applications and potential markets would result in greater processing costs and delay in service from using a lottery rather than an auction. NPRM at para. 55. This argument has no foundation because several years ago, the Commission processed all of the pending applications and developed a lottery list and a methodology for conducting the lottery. The Commission never released the lottery list because it wanted to further study whether to conduct lotteries or auctions. The point is that the Commission could have held the lottery any time it wanted to by simply issuing the public notice which was already drafted. If the Commission decides to use lotteries, it could issue a public notice in a matter of days and hold the lottery 60 days thereafter.

On the other hand, to hold auctions will require the promulgation of rules for conducting the auction, the issuing of public notices and an auction manual, the taking of applications and upfront payments and the actual conduct of the auction. In addition, the Commission will have to dismiss the over 50,000 pending applications, return all of the filing fees and defend in court any challenges from the dismissed applicants. The defense in court alone will put a cloud over the auction and inhibit bidding as well as financing to construct and operate the MAS systems.[19/]

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19/ The similarities of the MAS proceeding to *McElroy I and McElroy II* make for a very compelling court case.

In other words, the dismissal of the pending applications and return of filing fees will result in an administrative nightmare.

### B. The Changes to the MAS Service Rules Do Not Mandate Auctions

In the NPRM, the Commission argues that because it is proposing significant changes to the MAS service rules, it believes that "the previously filed applications would be inconsistent with [the Commission's] proposed licensing approach for MAS." NPRM at para. 56. In particular, the Commission cites the change from site specific licensing to geographic licensing, permitting a wider array of services, and allowing licensees to provide mobile and fixed operations on a co-primary basis with point-to multipoint operations. The Commission concludes that "the pending applicants would in any case need to substantially rethink their initial plans." *Id.*

The arguments raised by the Commission are nothing more than a red herring. For all sorts of services, the Commission is continuously liberalizing its service rules by making them more flexible, and applicants and licensees are continuously offering more and different services as they are permitted to by the Commission. If the Commission wishes to change from site specific licensing to geographic area licensing, the Commission could simply take the pending applications and assign them to the geographic area of each application's master transmitter site for the purposes of lottery. The lottery winner would then be assigned the license for that geographic area and would be required to comply with the Commission's construction requirements for geographic area licenses. If a particular applicant had more than one application pending in a particular geographic area, it would be limited to one chance in the lottery for that geographic area. Alternatively, the Commission could hold a lottery and issue licenses on a site-by-site basis. An auction can later be held to license the portions of the

geographic areas not covered by the site-by-site licenses. This approach has already been used for 900 MHz SMR and is planned for paging, 220 MHz SMR and 800 MHz SMR.

### C. Those With Pending Applications Had No Reason to Apply For Other Spectrum

In its NPRM, the Commission acknowledges that over 50,000 applications have been pending for several years, but argues that those applicants could have carried out their business plans by applying for other MAS channels. NPRM at para. 57. The Commission cannot use this argument as an excuse for its unreasonable delay in holding the lotteries. The applicants did not apply for other spectrum, because they fully expected the Commission to hold lotteries for the spectrum for which the applications were filed. Once the Commission completed processing of the applications, there was no excuse for its failure to hold the lotteries. For the Commission to blame the applicants for not applying for other spectrum while the applicants were patiently waiting for the Commission to hold a lottery that the Commission said it would hold is an exercise in "newthink" that George Orwell would be proud of.

## IV. If the Commission Dismisses the Pending Applications and Holds Auctions, It Must Return All Filing Fees to the Applicants

In the event that the Commission decides to dismiss the pending applications and hold auctions, then the Commission must return to the applicants all filing fees for the pending 50,000 plus applications. More than five years ago, in addition to their FCC filing fees, the applicants spent considerable amounts on legal and engineering costs for the preparation of their applications. All this money was spent in reliance on the Commission's *Public Notice* announcing the MAS filing windows. If the Commission were a private enterprise, the applicants would be able to sue the Commission for fraud, and they would be able to recover filing fees, application preparation expenses, cost of money over five years, and compensation for lost business opportunities, not to mention punitive damages.

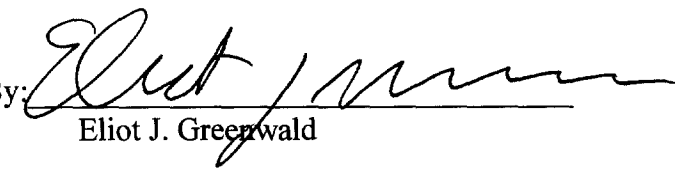
Of course, the Commission is not a private enterprise, and its liability would probably be limited to the return of the FCC filing fees. Therefore, the Commission must return those filing fees to the applicants. The applicants prepared and filed acceptable applications in reliance on the *Public Notice,* and if the Commission dismisses the applications, the Commission will not have given the applicants what they paid for--that is, a chance in the lottery. Therefore, fundamental fairness dictates that the Commission return the FCC filing fees for any applications it decides to dismiss.

**Conclusion**

In sum, as the Commission pointed out in its Unserved Areas Order, it was considerations of equity and administrative efficiency like those described above that led Congress to conclude that lotteries should be used to assign licenses for which applications were filed prior to July 26, 1993. These same factors convinced the Commission itself that lotteries should be used to assign licenses for unserved areas which fell into this category. Similarly, the Commission should rule that a lottery remains the appropriate means of assignment for the over 50,000 pending applications for MAS licenses.

Respectfully submitted,

**FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.**

By: 
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